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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 40

JOHN W. STANFORD, JR.,

Petitioner

VS.

STATE OF TEXAS,

Respondent

On Writ of Certiorari to the 57th Judicial District Court of Bexar County, Texas

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of Texas, Respondent, in reply to the Brief filed in this cause on behalf of Petitioner, would show:

I.

QUESTIONS PRESENTED

There are three basic questions involved in this appeal. The first of these is the validity of the statutes in Texas providing for Suppression of the Communist Party and Related Organizations. These statutes are contained in Article 6889-3 and 6889-3A of the Revised Civil Statutes of Texas. The first of these is known as

the Communist Control Act and the second is referred to generally as the Suppression Act. The search warrant issued in this cause was issued in specific compliance with Section 9 of Article 6889-3A, the Suppression Act. The constitutionality of this law has been challenged.

The second of these questions is whether or not under the particular facts shown by the record in this case the United States Government has pre-empted the field of subversion as to this particular individual defendant and therefore precluded action on the part of the State.

The third of these questions is whether or not the search warrant issued violated a provision of the United States Constitution either under the First, Fourth, Fifth, or Fourteenth Amendment of the same. This was alleged by the Petitioner in the Court below and is brought forward in this appeal with many various grounds of lack of constitutionality being charged.

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, First Amendment, reads in part, as follows:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The United States Constitution, Fourth Amendment, reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unrea-

sonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The United States Constitution, Fifth Amendment, reads in part, as follows:

> "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* * *"

The United States Constitution, Amendment Fourteen, states, in part, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Communist Control Law of Texas is contained in Article 6889-3 of the Revised Civil Statutes of Texas. The Communist Suppression Act is contained in Article 6889-3A of the Revised Civil Statutes of Texas. A complete copy of these acts have been appended to the Brief of Petitioner filed herein beginning in the Appendix at page 39. The Suppression Act appears in the Appendix of Petitioner's Brief beginning at page 44. The most pertinent portion of such act is Section 9 of Article 6889-3A which reads as follows:

> "A search warrant may issue under Title 6 of the Code of Criminal Procedure for the purpose of

searching for and seizing any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of this Act. Search warrants may be issued by any judge of a court of record in this State upon the written application of the District Attorney, Criminal District Attorney, or County Attorney, within their respective jurisdictions, accompanied by the affidavit of a credible person setting forth the name or description of the owner or person in charge of the premises to be searched, or stating that his name and description are unknown, the address or description of the premises, and showing that the described premises is a place where some specified phase or phases of this Act are violated or are being violated, or where are kept any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or written instruments of any kind showing a violation of some phase or phases of this Act; provided that if the premises to be searched constitute a private residence, such application for a search warrant shall be accompanied by the affidavits of two credible citizens. Except as herein provided, the application, issuance, and execution of any such warrant and all proceedings relative thereto shall conform to the applicable provisions of Title 6 of the Code of Criminal Procedure; provided that any evidence obtained by virtue of a search warrant issued under the provisions of this Act shall not be admissible in evidence in the trial of any proceeding, administrative or judicial save and except those arising under this Act."

The Suppression Act which contains the above provision provides in brief the following:

1. That the Legislature has determined that there is a Communist conspiracy committed to the overthrow

of the government of the United States, of the several states and of Texas, by force and violence. (Section 1, Article 6889-3A.)

2. That it is unlawful for any person to:

a. Commit, attempt to commit or aid in the commission of any act intended to overthrow, destroy, or alter, or assist in the overthrow, destruction, or alteration of, the constitutional form of the United States, or of the State of Texas, or of any political subdivision of either of them. (Section 5, Subsection 1, Article 6889-3A.)

b. Advocate, abet, advise, or teach by any means and person to commit, attempt to commit, or aid in the commission of any such act, under such circumstances to constitute a clear and present danger to the security of the United States or of the State of Texas, or of any political subdivision of either of them; or (Section 5, Subsection 3, Article 6889-3A.)

c. Conspire with one or more persons to do any of the above acts. (Section 5, Subsection 3, Article 6889-3A.)

d. Assist in the formation of, or participate in the management of, or *contribute* to the support of, or *become or remain* a member of, * * * the Communist Party of the United States or any component or related part or organization thereof, * * * knowing the nature of such organization. (Section 5, Subsection 4, Article 6889-3A.) (Emphasis supplied.)

The punishment for such an offense is set out in Section 6 as a fine not more than $20,000 or imprisonment not less than one year nor more than 20 years in the State penitentiary.

Pertinent provisions of Title 6 of Code of Criminal

Procedure of Texas, referred to in the Communist Suppression Law cited above, read as follows:

"Article 304. 'Search Warrant'

"A 'search warrant' is a written order, issued by a magistrate, and directed to a peace officer, commanding him to search for personal property, and to seize the same and bring it before such magistrate; or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense.

"Article 312. Application to Search Other Places

"A warrant to search any place suspected to be one where stolen goods are commonly concealed or where implements are kept for the purpose of aiding in the commission of offenses may be issued by a magistrate on written sworn complaint, setting forth:

"1. A description of the place suspected.

"2. A description of the kind of property alleged to be commonly concealed at such place, or the kind of implements kept.

"3. The name, if known, of the person supposed to have charge of such place, when it is alleged that it is under the charge of any one.

"4. When it is alleged that implements are kept at a place for the purpose of aiding in the commission of offenses, the particular offense for which such implements are designed must be set forth.

"Article 316. To Search Suspected Place

"A warrant to search a suspected place shall be sufficient if it contain the following requisites:

"1. That it run in the name of 'The State of Texas.'

"2. That it describe with accuracy the place suspected.

"3. That it describe, as near as may be, the property supposed to be commonly concealed in such suspected place, or the implements alleged to be there kept for the purpose of aiding in the commission of offenses, and state the particular offense for which such implements are designed.

"4. That it name the person accused of having charge of the suspected place, if there be any such person, or, if his name is unknown, that it describe him with accuracy, and direct him to be brought before the magistrate.

"5. That it be dated and signed by the magistrate, and directed to the sheriff or other peace officer of the proper county.

"Article 328. Magistrate Shall Investigate

"The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him."

III.

STATEMENT OF THE CASE

Two assistants of the Attorney General of Texas, Lonny Zwiener and V. Murray Jordan, were assigned to the investigation of Communist Party activity in the State of Texas. (R. 61-62, 58.) Jordan testified that in this investigation he talked to confidential informants and was told that the Petitioner was an official of the Communist Party in Texas. He was also told that Stanford also distributed certain described Communist Party literature at Communist meetings in Texas. He was shown various samples of the material used and was told by these informant that he (the in-

formant) had received this literature from Stanford at a Party meeting. (R. 61-62.) Zwiener testified that he also had such information, and added that he had been informed that this type of literature, pamphlets, etc., were located on the premises of John Stanford, and that on December 12, 1963, a few days before the issuance of the warrant, this type of literature was mailed from the home address of John Stanford. (R. 58.)

Applicant's Exhibit No. 11 is the joint affidavit of Jordan and Zwiener attached to the Application for the Search Warrant, and appears in the Record at page 70. The Application for the Search Warrant appears in the Record at page 71. The Search Warrant itself appears in the Record at page 72.

Such search warrant was served upon the wife of the Petitioner at the home of the Petitioner on December 27, 1963, and a return was made by the officers serving the warrant and introduced as Exhibit 17. (R. 74-107.)

IV.

SUMMARY OF THE ARGUMENT

The Texas Communist Control Act and Suppression Acts are valid enactments not pre-empted by the Communist and Subversive enactments of Congress. *Gitlow v. New York*, 1925, 268 US 652, 69 L. Ed. 1138, 45 S. Ct. 625; *Uphaus v Wyman*, 1958, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090; *Head v New Mexico Board of Examiners*, 1963, 374 U. S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983. Pre-emption is a legal and not a factual matter.

The search warrant was issued on probable cause under numerous authority. That the papers in this

application do not fall into the vice of *Aguilar v. Texas*, 1964, 378 U. S. 108, 84 S. Ct. 1509, since the affidavit shows verification of the information given from additional extrinsic facts.

No case has ever held that a recitation in the application for a search warrant to the specific statute violated was insufficient to set out the crime being investigated through the search.

The description of the items seized was sufficient under the law.

What items become implements of crime primarly depend upon legislative enactment and the Legislature has the power to fix reasonable limitations upon what can be seized.

V.

ARGUMENT

A. The Texas Communist Control and Suppression Acts are Valid

This is the first time that there has ever been a challenge to the constitutionality of the statutes of Texas suppressing the organization and operations of the Communist Party in Texas. The Criminal District Attorney of Bexar County, Texas, has held up the presentment of this matter to the Grand Jury because of the challenge made in this case. If the Communist Control and Suppression Acts are valid enactments and their provisions are constitutional, this Petitioner should be prosecuted under them. It is the opinion of the officers representing the State of Texas that such acts are valid and constitutional.

It has been held by this Court that the State may lawfully and constitutionally enact a statute which

provides that it shall be a felony to advocate the overthrow of the lawful organized government by force and violence. *Gitlow v. People of New York*, 1925, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138. In that case the statute defined the offense called "criminal anarchy" as the doctrine that organized government should be overthrown by force or violence or by any unlawful means and declared that the advocacy of such a doctrine was a felony. The Court pointed out that:

> "Every presumption is to be indulged in favor of the validity of the statute. * * * And the case is to be considered 'in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare: * * *.' That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear."

The Court in that case, cited many other decisions along the same vein, both from this Court and the appellate courts of the various States.

For instance, the validity of a state statute allowing the revocation of a license to a school which teaches the overthrow of the government by force, violence or unlawful means was upheld in *People v. American Socialist Society*, 1922, 195 N.Y. Supp. 801, 202 App. Div. 640.

In *People v. Lloyd*, Supreme Court of Illinois, 1922, 136 N.E. 505, 304 Ill. 23, where the prosecution was under a statute making it a criminal offense to advocate the overthrow of the organized government by force and violence the Court said:

> "Plaintiffs in error contend that every section of said act is invalid for the reason that the General

Assembly of Illinois does not have the power and authority to make unlawful and punishable the advocacy of the reformation or overthrow of all or of the separable part of the constitutional representative form of government of the United States of America, or the constitutional representative form of government of all or any one of the other 47 several states of the United States, and that the Congress of the United States is the only legislative body in the United States, if any, which has the power and authority to make such advocacy unlawful and punishable. This contention is based in part at least on the argument that the power and authority to 'guarantee to every state in this Union a republican form of government' and to 'protect each of them against invasion' are lodged by section 4 of article 4 of the Constitution of the United States exclusively in the United States. This contention is not sound. The citizens of this state are citizens of the United States, and the citizens of the United States residing within the borders of this state are citizens of this state. Each citizen owes a duty to these two separate sovereignties. The state is a part of the nation, and owes a duty to the nation to support the efforts of the national government to secure the safety and protect the rights of its citizens, and to preserve, maintain, and enforce the sovereign rights of the nation against public menace, and to that end the state may require its citizens to refrain from any act which will interfere with or impede the national government in effectively defending itself against such public enemies. * * * There is nothing in the federal Constitution in any way granting to the federal government the exclusive right to punish disloyalty."

The conviction was affirmed.

There are other cases in which the state subversion statutes have been upheld. Some of these are:

Commonwealth v. Widovich, 1929, Supreme Court of Pennsylvania, 295 Pa. 311, 145 A. 295, Cert. Den. 280 U. S. 518, 50 S. Ct. 66, 74 L. Ed. 588. This case upheld the Pennsylvania Sedition Statute.

Whitley v. People of California, 1926, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095. This case upheld the validity of the California "criminal syndicalism" statute.

State v. Tachin et al., Supreme Court of New Jersey, 1919, 106 A. 145, affirmed by Court of Appeals, 1919, 108 A. 318. This case upheld a State statute prohibiting sedition against the Federal government alone.

Faxon v. School Committee of Boston, Supreme Judicial Court of Massachusetts, 1954, 120 N.E. 2d 772. This case upheld a state statute requiring a teacher to testify whether or not she was a member of the Communist Party.

Wyman v. Sweezy, Supreme Court of New Hampshire, 1956, 121 A. 2d 783. This case upheld the right of the Attorney General to investigate subversive activities in his state under a Legislative Resolution. The holding in this case was reversed by the Supreme Court of the United States in *Sweezy v. New Hampshire*, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311, in 1957, on the theory of infringement of "academic freedom" however the law of this case was again modified by the *Uphaus* case discussed hereafter under this point.

The law was as clear as it could be on this point until the decision of the Supreme Court of the United States in *Commonwealth of Pennsylvania v. Nelson*, 1956, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640. This was an appeal by Steve Nelson, an organizer for the Communist Party from a conviction under the Pennsylvania sedition act. The facts of this case become complicated by

the fact that the alleged sedition was against the "United States" and not against the State of Pennsylvania. Nelson had raised in the Superior Court of Pennsylvania the issue that the court was without jurisdiction because the Federal Government had preempted or occupied the field. (92 A. 2d 434.) The state Superior Court had said:

> "These Acts (McCarran and Smith) are very broad and include the protection of the national as well as the state government from the ravages of Communism. However, that alone does not nullify the State legislation. As we have just stated, that nullification comes about only when the Federal Government's jurisdiction is exclusive or when it is supreme, and in the latter case the Federal Government must expressly or by necessary implication indicate its intention of superseding or precluding action of the states. * * *"

The Superior Court then concludes that there is nothing in either act to lead to that conclusion and points out that the McCarran Act has a specific provision that expressly states that it is not modifying existing law.

The Superior Court then holds that sedition is a field over which the States and Federal Government have concurrent jurisdiction. This Court also holds that the State need not have to depend upon the vigilence and action of Federal authority and risk its own existence in the bargain. The intelligence of this view is amply borne out by recent events in Dallas, Texas, occurring since the original trial of this matter. It is pointed out in this case also that there is absolutely nothing in the Constitution which relegates this field exclusively to the United States.

When the case finally reached the Supreme Court of

the United States, the opinion, handed down by the Chief Justice for the majority, asserted for the first time the doctrine of Federal pre-emption in the field of sedition and had statements in his opinion that leave the clear impression that no State sedition statute is thereafter valid. Such statements include:

> "It should be said at the outset that the decision in this case does not affect the right of the States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. * * *"

How state officials charged with the duty of enforceing the Legislative enactments of the state are to determine the times that the Federal Government is supposedly protecting the entire country and the times that the Federal Government is not, is not disclosed.

Nelson also states:

> "* * * Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power. * * *"

After setting out the Smith Act, the Court concludes:

> "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress had intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law. * * *"

> "*Second*, the federal statutes touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject. * * *"
>
> "*Third*, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. * * *"

Under this point the Court relies upon a Presidential request that all sheriffs and other officers turn over to the F.B.I. all information on subversion and a speech by J. Edgar Hoover. On this authority the doctrine of pre-emption is imposed.

If this were the end of the matter, there would have been no search warrant run on the home of this Petitioner and no possibility of his indictment. But this is not the end of the story, for in *Uphaus v. Wyman*, 1958, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090, the Court speaking through Justice Clark discussed again the problem of sedition and the states. Here the judgment appealed from was for contempt of the Legislature for refusal to answer questions before an investigating committee. The contention of the Defendant was that the Smith Act and the other federal statutes occupied the field of subversion to the exclusion of the state authority. He relied specifically on the *Nelson Case*, supra, and it certainly holds what he says it holds. However, at this point the Court attempts to clarify what it meant in this opinion by saying:

> "Appellant vigorously contends that the New Hampshire Subversive Activities Act of 1951 and the resolution creating the committee have been superseded by the Smith Act, as amended. In support of this position appellant cites Com. of Pennsylvania v. Nelson, supra. The argument is that Nelson which involved a prosecution under a state

sedition law, held that 'Congress had intended to occupy the field of sedition.' * * * This rule of decision, it is contended, should embrace legislative investigations made pursuant to an effort by the Legislature to inform itself of the presence of subversives within the State and *possibly to enact laws in the subversive field.* The appellant's argument sweeps too broad. In Nelson itself we said that the 'precise holding of the court' * * * is that the Smith Act * * * which prohibited the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the *'same conduct.'* (Italics supplied) * * * The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. *The opinion made clear that a State could proceed with prosecutions for sedition against the State itself;* that it can legitimately investigate in this area follows *a fortiori.* In *Sweezy v. State of New Hampshire,* supra, where the same contention was made as to the identical state Act, it was denied *sub silentio.* Nor did our opinion in Nelson hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the State had full power to deal with internal civil disturbances. Thus *registration statutes, quo warranto* proceedings as to subversive corporations, the subversive instigation of riots and a host of other subject directly affecting state security furnish grist for the State's legislative mill * * *" (Emphasis supplied.)

What the problem then boils down to is this. If the Texas statute is invalid because it is pre-empted by action of the Smith or McCarran Acts, then the search

in this case is illegal. This is because there was no valid statute upon which it could be based. If this is the case the action of the trial court should be reversed.

Texas is not the only state that has confronted the problem raised by the conflict in language between the *Nelson* and *Uphaus* cases. In *Braden v. Kentucky*, 1956, 291 S. W. 2d 843, the Court of Appeals of that state followed the decision in the *Nelson* case where the defendant, Carl Braden, was charged with an attempt to violently overthrow both Kentucky and the United States. The Court qualified the opinion by stating:

> "* * * To be certain of making ourselves clear, we now state this opinion does not foreclose the possibility of a prosecution by the Commonwealth of the crime of sedition directed exclusively against the Commonwealth of Kentucky."

In *Florida v. Diez*, 1957, 97 So. 2d 105, the Supreme Court of Florida held that the passage by the U. S. Congress of the three acts involved (Smith Act of 1940, Internal Security Act of 1950, and the U. S. Communist Control Act) did not pre-empt the entire field as to subversive activities. This court pointed out that in *Nelson*, the defendant was charged with attempting to overthrow the United States in violation of a State statute, and the holding did not limit the right of the State to protect itself.

This court has had an occasion to recently discuss the rules with relation to the doctrine of pre-emption in *Head v. New Mexico Board of Examiners*, Decided June, 1963, 374 U. S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983. In the majority opinion by Justice Stewart, he sets out the general rules in this type of case. He says that a charge of pre-emption by the Federal Government of a particular field, the rules are:

1. Such claim cannot be judged by broad statements about the "comprehensive" nature of the federal regulation.

2. The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State must be answered by a judgment on the facts of the particular case.

3. The basic question is whether Congress intended to make its jurisdiction exclusive.

4. In areas of the law not inherently requiring national uniformity, decisions require that state statutes, otherwise valid be upheld, unless there is found:

a. Such actual conflict between the two schemes of regulation that both cannot stand in the same area; or

b. Evidence of a congressional design to pre-empt the field.

In Justice Brennan's concurring opinion, he states the rules in the following sequence:

1. Whether the subject matter is clearly one which "by its very nature" admits "only of national supervision."

2. Whether there is evidence of congressional intent exclusively to occupy the field.

3. Whether as a practical matter—both regulations can be enforced without impairing the federal superintendence of the field. This test also requires a showing of conflict in purpose or in operation between the state and federal regulations involved.

A recent federal district court case upholding the Louisiana Anti-Subversion Law, a law very similar

to the Texas statutes, is *Dombrowski, et al. v. Pfister*, 227 F. Supp. 556.

We do not think that the Texas statutes are void or invalid upon their face for any constitutional reason. Since the statutes include subversion aimed at the State of Texas, we do not think that the Federal government has the exclusive jurisdiction in this field. Under the explanation of the *Nelson* case in the *Uphaus* case, we do not think that the statute has been superseded. After all, under the *Uphaus* case, there would have been no reason for a Legislative inquiry if there was not the power to legislate. Therefore, we think that on this ground the Petition for the Writ of Certiorari should be denied.

B.

Pre-emption as a Factual Matter

The Petitioner proved by its witness, John Goode (R. 22) that the Petitioner was under investigation by the Security Division of the State of Texas and the Governor of Texas in 1951. (R. 23). About all this established was that this Petitioner was suspected of Communist activity for a considerable period of time. The Petitioner also proved that the United States Marshal for the Western District of Texas, Jesse Dobbs, had served the Petitioner with a Report and Order that he register as a Communist on December 26, 1963. (R. 16, 17). The search warrant in this case was served upon the house of the Petitioner on December 27, 1963.

Hugh Nations, Reporter for the San Antonio Express, a daily newspaper, testified that the news report of the order by the Subversive Activities Control Board did not get into the newspaper and onto the

street until 12:45 P. M. on December 27, 1963. (R. 66). The parties that conducted the search arrived at the Stanford residence at 2:30 P. M. (R. 32). The application for the warrant recited that it was made as a result of mailing of material from the Petitioner's house on December 12, 1963. None of the material mailed was introduced.

It is the position of the State of Texas that the doctrine of pre-emption is not a subject of factual proof as was here attempted by the Petitioner, but is, in fact, a legal proposition involving the comparison of the laws and a construction involving the intention of Congress and the State Legislature passing the act. In this matter the *Nelson* case, supra, is again relied upon by the Petitioner, and the construction of the case in the *Uphaus* case.

The position of the State is that these holdings show clearly that the State and Federal Governments have concurrent jurisdiction in this matter. At least this is true in that the Federal government has the right to protect the United States from subversion and the State of Texas has a right to defend itself from overthrow of the State. The fact that both authorities are interested in the same individual would appear to show nothing in relation to the right of each government to act. We feel that the intent of the holdings of the *Nelson* and *Uphaus* cases is not that whichever authority begins first, in point of time, ousts the other from jurisdiction and power to act. A more logical view would be that each authority has the right to protect itself.

As to this point, the State feels that the Petition for Certiorari should be denied.

C.

CONSTITUTIONAL ATTACK ON THE SEARCH WARRANT ITSELF

A multi-barreled attack is levied at the search warrant in this case. It is claimed to violate the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. In addition, other claims are made concerning conformity to the statutes involved.

In 24 R. C. L. 715, it is said:

> "While search warrants seem to have been first confined to proceedings for the discovery and seizure of stolen goods, their use has been extended by statutory enactments as an aid to the discovery and punishment of any character of public offense when it may be available. The grounds on which such a warrant may be issued may be divided into three classes: (1) when the property sought has been stolen or embezzled; (2) when it has been used as a means of committing a felony; and (3) when it is in the possession of any person with the intent to use it as the means of committing a public offense. But as a rule the use of it may not be extended by construction to any case not clearly covered by statute. However, the term 'unreasonable,' in the constitutions of the states, has allusion to what had been practiced before our revolution, and especially to general search warrants, in which the person, place or thing was not described. It is believed that no search warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause."

Article 304 of Title 6 of the Code of Criminal Procedure of Texas authorizes search warrants for the purpose of searching the premise for stolen property,

or "implements kept for the purpose of being used in the commission of any designated offenses." This type of provision is not unusual. The Supreme Court of Oregon has pointed out in *State of Oregon v. Chinn*, 1962, 373 Pac. 2d 392, that virtually every American jurisdiction has a statute of similar import which restricts the type of evidence which may be seized under warrant. In addition to this, the Communist Suppression Act itself contains a specific provision as to what may be seized under Section 9 of Article 6889-3A, Texas Revised Civil Statutes.

The search warrant in this case calls for:

> "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas * * * unlawfully possessed in violation of Article 6889-3 and Article 6889-3A, Revised Civil Statutes of the State of Texas. * * *"

1. PROBABLE CAUSE

The petitioner complains that the search warrant was not issued on probable cause. The facts show that the two Assistants Attorney General involved, Zwiener and Jordan, had information from credible and reliable persons that:

1. The Petitioner was an official of the Communist Party of Texas.

2. That Petitioner had distributed literature which was identified as Communist Party literature at Communist meetings in Texas.

3. That Jordan had been shown samples of this literature and knew of what it consisted.

4. That on December 12, 1963, such literature had been mailed from the home address of Petitioner.

Petitioner at the Magistrate's hearing to determine the validity of the search warrant carefully avoided inquiring into the question as to whether all the foregoing facts were brought to the attention of the Magistrate at the time of the application for the search warrant (R. 16-67).

It is clear under the state law that membership in the Communist Party, attendance of such meetings, being an official of such party, failure to register as a member of such Party, and contributing to further the cause of this party would also constitute offenses under the Communist Control and the Suppression Acts, discussed heretofore.

The attack made upon the search warrant under this section seems to be that the Petitioner feels that the warrant was issued on hearsay information and conclusion from what the Affiants had been told.

The Supreme Court of the United States has recently held that probable cause could be supported by hearsay, and that a search warrant could constitutionally issue on this type of information. *Wong Sun v. United States*, 1963, 371 U. S. 471, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441; *Jones v. United States*, 1960, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697.

It seems to be clear from numerous authorities that no specific test of what constitutes "probable cause" has ever been laid down. "Probable cause" fixes and is a legal standard. *U. S. v. Wroblewski*, 1939, 7th Cir., 105 F. 2d 444. It means that the "grounds" for the issuance of the warrant must be stated and that there is no express prescription with respect to it in the

Constitution. *Lowrey v. U. S.*, 1947, 8th Cir. Ark., 161 F. 2d 30, Cert. Den. 331 U. S. 849, 67 S. Ct. 1737, 91 L. Ed. 1858, reh. den. 332 U. S. 787, 68 S. Ct. 36, 92 L. Ed. 369.

Probable cause, of course, deals with probabilities. It need not on its face be sufficient proof to convict. *U. S. v. Nicholson*, 6th Cir., Tenn., 1962, 303 F. 2d 330, Cert. Den. 371 U. S. 823, 83 S. Ct. 43, 9 L. Ed. 2d 63; *Dumbra v. U. S.*, 1925, 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032.

In *West Virginia v. Kees*, 1922, 114 S. E. 617, 27 A.L.R. 681, the Supreme Court of Appeals of that State, discussing the common law as to probable cause, said this:

> "* * * Under the common law in effect in this country at the time of the adoption, not only of the Federal Constitution, but of the various State Constitutions, search and seizure warrants were issued; but there were only allowed to be issued upon complaint made upon the oath or affirmation of the party seeking the same. The English Constitution had guaranteed to the citizen this immunity to his person and premises from search and seizure from a time whereof the memory of man runneth not to the contrary, and we think it may be said that when the constitutional provision relied upon came into the organic law of the American states, the purpose was to preserve to the citizen the right then enjoyed by him under the common law of England.
>
> "It cannot be doubted but that under the common law, a complaint made upon the information of the party desiring the issuance of the warrant, in the form of the complaint involved in this case, would have constituted probable cause for the issuance thereof. In fact, an examination of the au-

thorities shows that the usual search warrant was issued at the time was that affiant had probable cause to suspect, and did suspect, that an offense was being committed upon particular premises under the control of particular parties. * * *"

The most recent case in the field at the present time was decided by the Supreme Court after this petition was filed. It is *Aguilar v. Texas*, 1964, 378 U. S. 108, 84 S. Ct., 1509.

The *Aguilar* case involved a search warrant issued by officers in Houston for the purpose of searching for narcotics. The differences between that case and this one appear to be simple. Here the attorneys making the affidavit had both information gathered during investigation concerning Communist materials located at the premises described and information as to mailings from these premises of the same type of materials made shortly prior to the application. (R. 71, 72.) Under the State law at the time both the *Aguilar* warrant and the *Stanford* warrant would be valid. As a matter of fact, the *Stanford* warrant goes much further than the *Aguilar* warrant. The Court in *Aguilar* states:

"* * * Thus, when a search is based upon a magistrate's rather than a police officer's determination of probable cause, the reviewing courts will accept evidence of less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant."

The Court in *Aguilar* specifically stated it would allow a search warrant to be issued upon hearsay, but required that supportive facts be stated. Here we have supportive facts—the mailing on a specific date—certainly confirming the information given. Thus, we do not think the State falls into the same situation as it did in *Aguilar*.

We believe that these facts show probable cause and that the magistrate was justified in issuing the warrant.

2. FAILURE TO SPECIFY THE CRIME CHARGED

While we have no desire to argue the points made by the Petitioner that in criminal process, complaints and indictments require that the crime for which they are brought be specified, we can find absolutely no authority holding that this is a requirement of a search warrant. None of the cases cited by Petitioner hold this and we are not aware of any others so holding at this time.

It is obvious that warrants of commitment and indictments stand on an entirely different ground than search warrants, since their only purpose is to state the crime committed and the search warrant is for a different purpose altogether. The Texas statutes require that the offense be designated (See Art. 304, CCP; Art. 312, CCP; Art. 316, CCP, supra), and here both the affidavit and warrant set out that the implements to be searched for were used in violating Articles 6889-3 and 6889-3A, Revised Civil Statutes of Texas. No case holds that any further specification of the crime is a constitutional requirement, and it is interesting to note that the affidavit in *Jones v. United States*, 302 U. S. 257, cited, apparently with approval by the Court in the *Aguilar* opinion, describes the occupants of the premises searched as engaged in "illicit narcotic traffic" and the "sale of narcotic drugs" and the items to be seized as "illicit narcotic drugs," generalized descriptions covering a number of offenses under the laws of the United States.

3. ITEMS SEARCHED FOR AND DESCRIPTION IN WARRANT

The items seized in this raid included many books and papers. Most of the books were in multiple copies. Included were such things as Reports of the Fair Play for Cuba Committee. Other books included On the Party-Lui Sho-Chi, Peking, 1950; Soviet booklets on the Trial of American U-2 Spy Pilot from Moscow; Joseph Stalin's biography; and books by Earl Browder, Eugene Dennis, Fidel Castro, Che Guevara, Karl Marx, Frederick Engles, V. I. Lenin, William Z. Foster, Hu Sheng, N. S. Khrushchev and Gus Hall. Also included were several files of addresses and names; and a metal letter file cabinet containing a file of the Gus Hall-Benjamin Davis Defense Committee and other files.

The last item listed above contained a large amount of letter files, samples of which have been shown as exhibit 16. Unfortunately, the last few files in this cabinet contained some personal files of the Petitioner and were tendered back to the Petitioner in the course of the hearing. (R. 42, 45-47.) The Petitioner refused any of his personal papers, apparently under the impression that acceptance would void his claim of invalidity of the search.

The position of the State of Texas is that such items would, in view of the facts shown, constitute implements kept for the purpose of committing a designated offense, under the statute. Various items have been held to constitute implements under our law. In *State of Oregon v. Chinn*, supra, the Supreme Court of Oregon held that a bottle used to give beer to a minor could be an implement in the commission of statutory rape. This court also held that a bed-sheet and a cam-

era with which pictures of the girl were taken could constitute implements.

Judge Learned Hand discussed a similar problem in *U. S. vs. Kirschenblatt*, 1926, 2nd Cir., 16 F. 2d 202, when considering a search in which papers showing liquor transactions were seized and stated:

> "* * * The real difficulty in this case at bar appears to us to be in the application of the last doctrine, because it is apparent that a paper may be itself the very thing against which the law is directed. * * * As was said in Gouled v. U. S., papers as such have no sanctity, and may be seized, like any other property, if they offend. Courts have at times extended the doctrine to papers, not actually part of the criminal act, but necessary to the conduct of the venture as a whole. * * *
>
> "The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all of these may be contraband and subject to seizure when found on the premises. * * *"

The Court held that illegally overprinted stamps were contraband in *U. S. v. Rabinowitz*, 1950, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

In *Leahy v. U. S.*, 1959, 9th Cir., 272 F. 2d 487, under a charge of evasion of the occupation tax on wagering the court upheld the seizure of an "adding machine, a telephone, record books, receipts, pencils, pens, money, keys to safety deposit boxes, rifles and pistols" as instrumentalities of crime and stated specifically:

> "* * * records of an illicit business are instrumentalities of crime."

See also: *Johnson v. United States*, 1961, USCA-DC, 293 F. 2d 539.

Chief Justice Taft remarked in writing for the majority in *Carroll et al. v. United States*, 1925, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, that

> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. * * *"

In *Marron v. United States*, 1927, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, the Court held that the seizure of bills sent to a place of business and a ledger showing the operation of a place of business selling intoxicating liquor did not violate the Fourth Amendment. Here the items had been taken by prohibition agents during a search for intoxicating liquor under a warrant for liquor. This result was reached on the theory that such search was not unreasonable because such items were things used to carry on the criminal enterprise. The court noted that they were as important as the bottles and glasses to the carrying on of the business.

Certainly, in view of the knowledge that the officers in this case had, the pamphlets and books seized here were important to carrying on the seditious activity involved. See also *Adams v. New York*, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575.

Several cases other than those above have allowed papers which constituted instrumentalities of the crime to be admitted after seizure by warrant. *Mac Knight v. United States*, 1st Cir., 1920, 263 F. 832, 838, Cert. Den., 253 U. S. 493, 40 S. Ct. 586, 64 L. Ed. 1029; *Foley v. United States*, 1933, Fifth Cir., 64 F. 2d 1, Cert. den., 289 U. S. 762, 53 S. Ct. 796, 77 L. Ed. 1505; *Johnson v. U. S.*, 1961, D. C., 293 F. 2d 539; *Brunatt v. U. S.*,

1944, 4th Cir., 145 F. 2d 270, Cert. den., 323 U. S. 788, 65 S. Ct. 314, 89 L. Ed. 628; *Sanders v. U. S.*, 1956, 10th Cir., 238 F. 2d 145.

The Petitioner complains of the description of the property to be searched for, and contends that such description is insufficient to meet the constitutional test. The description is precisely in the words of the statute as to what may be searched for. As was pointed out in *Commonwealth of Pennsylvania vs. LaCamera*, 1963, 186 A. 2d 63, stolen property was required to be particularly described because the owner knew what his property consisted of. But the same is not true when searching for such items as gaming implements, implements for the sale or manufacture of liquor and like items. To hold otherwise would require the officer to be specific in guesswork as to what he would find.

As to State practice, the Constitution of Texas actually recognizes this problem when it states in Article 1, Section 9 as follows:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them *as near as may be*, nor without probable cause, supported by oath or affirmation." (Emphasis supplied.)

It has been held that a general description of the property to be searched for is sufficient under the laws of Texas. *Parrack v. State of Texas*, Court of Criminal Appeals, 1950, 288 S. W. 2d 859:

CONCLUSION

The State of Texas has attempted to follow and has clearly followed the Legislative enactments providing for this Search Warrant. The Magistrate has passed upon the probable cause for this warrants issuance twice—before issuance and in the statutory hearing after issuance.

If the law under which the State acted is valid—and we believe it is—whether the items seized prove the guilt of this Petitioner and are admissible is a matter for a proper trial after indictment.

We think the action of the trial court was proper—the law is valid—and the magistrates action should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have entered my appearance on behalf of the Respondent, State of Texas, in the above entitled and numbered cause, and I certify that copies of the foregoing Brief for Respondent were served upon Maury Maverick, Jr., Maverick Building, San Antonio 5, Texas, John J. McAvoy, 14 Wall Street, New York 5, New York, and Melvin L. Wulf, 156 Fifth Avenue, New York 10, New York, Attorneys for Petitioner, by depositing same in the United States mail, properly addressed, postage paid, certified mail, on this the _____ day of _____, 1964.

_____

JAMES E. BARLOW
Of Counsel